IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

Nos. 611 and 612.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND,
Petitioners,

v.

PENNSYLVANIA WATER & POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT PENNSYLVANIA WATER & POWER COMPANY IN OPPOSITION.

Statement.

The petitions of Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) and the Maryland Commission and the Memorandum of the Federal Power Commission (FPC) as *amicus curiae* in support of these petitions present no sound ground for the review by this Court of the decision of the Fourth Circuit holding illegal the contract (Safe Harbor contract) for the sale of power by Safe Harbor Water Power Corporation (Safe Harbor), a Pennsylvania corporation, to Consolidated (a Maryland corporation) and respondent Pennsylvania Water

& Power Company (Penn Water), a Pennsylvania corporation (Printed Record in this case (R., pp. 231-250)). The petitions seek a review of a decision which was simply a sequel to and followed in all material respects an earlier decision of the Fourth Circuit holding illegal the substantially identical contract (Baltimore contract) for the sale of power by Penn Water to Consolidated, as to which earlier decision this Court denied certiorari.*

The only issue in the Safe Harbor contract case which was not before this Court when it denied certiorari in the Baltimore contract case is whether the Safe Harbor contract is substantially identical with the Baltimore contract. Both the District Court for the District of Maryland and the Fourth Circuit (unanimously) decided that it was so substantially similar as to present an appropriate case for summary judgment. Counsel for Consolidated itself had asserted on the record in the Baltimore contract case that the two contracts were substantially identical (R., p. 52).** This new issue is certainly not a matter of general Federal law or public interest meriting a second review or the attention of this Court.

In each contract case the Fourth Circuit adjudged the contract illegal *per se* and void in its entirety, as in violation of the Federal antitrust laws, the corporation and utility statutes of Pennsylvania and common law and public policy. The Fourth Circuit held in each case that the contract surrendered control of the seller to Consolidated

---

* *Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light and Power Company of Baltimore, Public Service Commission of Maryland,* 184 F. 2d 552 (1950), cert. den. 340 U. S. 906 (1950).

** It was necessary for Penn Water to bring this case only because, following denial of certiorari in the Baltimore contract case, Consolidated retracted its previous concession that the contracts were substantially identical and refused to concede that the Safe Harbor contract was similarly illegal.

and stifled the seller's initiative with respect to rates, services, operating economies and new business, and destroyed its independent corporate character as a Pennsylvania corporation. The Fourth Circuit held each contract to be violative of the fundamental, organic law of Pennsylvania, common law and public policy, and not a mere violation of some regulation imposed by Pennsylvania or its Public Utility Commission.

The Fourth Circuit held that Penn Water, Safe Harbor and Consolidated, except for the illegal contract, would be in potential competition in the generation, transmission and sale of electric energy at wholesale.*

The Court held each contract contained *per se* illegal restraints giving control to Consolidated over the seller's contracts, sales, prices, territories, markets, output and expansion.

Not only did each contract, by its express terms, give Consolidated these restrictive control powers over the seller, but the specified return method of payment provided for effectively prevented competition by stifling all incentive of the seller to compete, obtain new business or

---

* Penn Water is a Pennsylvania electric utility corporation with hydro and steam electric generating plants at Holtwood, Pennsylvania on the Susquehanna River, with transmission lines connecting with Safe Harbor, Pennsylvania Power & Light Company, Philadelphia Electric Company and Metropolitan Edison Company in Pennsylvania, and through a wholly owned subsidiary with Consolidated and Potomac Electric Power Company in Maryland.

Safe Harbor is a Pennsylvania electric utility corporation owning a hydroelectric generating plant at Safe Harbor, just above Holtwood, on the Susquehanna River.

Consolidated is a Maryland electric utility corporation with steam electric generating, transmission and distribution facilities in and around Baltimore, Maryland. Consolidated has generating capacity several times that of Penn Water or Safe Harbor, and its gross assets are also several times larger than those of either Penn Water or Safe Harbor.

effect operating economies. Under each contract the seller was to be paid for power not on the customary basis of a rate specified in advance per unit of capacity and energy actually furnished, but, regardless of the amount of power delivered, on the unusual basis of annual payments equal to all of the seller's operating expenses, including taxes, and a specified percentage return on plant investment, with a credit for revenues received by the seller from sales of power to others made with Consolidated's approval.

The Safe Harbor contract, entered into on the same date as the basic agreement of the Baltimore contract, was substantially similar to the Baltimore contract, except that Safe Harbor's power not sold to others under contracts approved by Consolidated and Penn Water was to be sold two-thirds to Consolidated and one-third to Penn Water (instead of all to Consolidated), and Consolidated and Penn Water divided the residual payments to be made to Safe Harbor therefor on a two-thirds—one-third basis.* While "Chinese copies" of the restrictive provisions contained in the Baltimore contract are not in all instances found under the same article numbers in the Safe Harbor contract, provisions to the same effect are contained in the Safe Harbor contract and, in fact, some of the provisions are "Chinese copies" of the Baltimore contract provisions.**

---

* The Baltimore contract consisted of three agreements dated December 31, 1927, June 1, 1931 and September 29, 1939 (Tr., pp. 62-84, 87-102). The Safe Harbor contract consisted of three agreements dated June 1, 1931, August 1, 1932 and November 22, 1939 (R., pp. 91-112). In the case of each contract the basic agreement was the one dated June 1, 1931.

** For example, (a) the payment provision of Article III of the Baltimore contract is found in Article V of the Safe Harbor contract and (b) the provisions for an Operating Committee, giving Consolidated a veto over managerial decisions of the seller, are found in Article VIII of the Baltimore contract and in Articles IV and XIV of the Safe Harbor contract.

Counsel for Consolidated stated in the District Court in the Baltimore contract case (R., p. 52): "the [Safe Harbor] contract is substantially the same [as the Baltimore contract]. * * * It is almost identical language." And in its brief in the Fourth Circuit in the Baltimore contract case Consolidated stated (p. 34) that the Safe Harbor contract was a "sister contract" to the Baltimore contract "executed simultaneously" therewith, and (p. 35) "the Basic Agreement [the Baltimore contract] and the supplementary agreement with Safe Harbor [Safe Harbor contract] are in essence an energy sales contract".

The Baltimore and Safe Harbor contracts were made for a term of fifty years at a time (June 1, 1931) when Penn Water, Safe Harbor and Consolidated were under the common control of J. E. Aldred and associates, which control began in 1910 and extended at least through 1946 (Fourth Circuit decision, 184 F. 2d 552, 557 (1950)). The contracts were leftovers from the era of private banking house and holding company control of utilities. As the Fourth Circuit said with respect to the contracts:

> "These restrictions which tied the parties together and stifled individual initiative for the period of fifty years were made to promote the advantage of the persons in control and not primarily in the interest of the public" (R., p. 243).

Consolidated injected into the Baltimore contract case (for the first time on appeal) the claim that the FPC had authority to exempt the contract from the antitrust laws and had done so, and that the courts were ousted from jurisdiction to enforce those laws by the Federal Power Act. The Fourth Circuit rejected the contention and pointed out the complete absence from the Federal Power Act of any provision therefor such as is contained in some other

Federal regulatory statutes. The same claim was made in the Safe Harbor contract case and again rejected.

The same contention was presented in the petitions for certiorari in the Baltimore contract case, which this Court denied, and now once again is put forward in the present petitions. Penn Water's reply to the petitions in the Baltimore contract case pointed out that there was no issue in that case warranting review by this Court. Penn Water also pointed out, however, that there was another issue which this Court might have to decide, and which could only be decided in a case reviewing FPC orders, not in a case, such as the Baltimore contract case, where no FPC orders were on review. That other issue was the effect of the contract illegalities on FPC orders (then under review in the D. C. Circuit) based on and directing continuance of contractual arrangements which the Fourth Circuit had held illegal.

When such FPC orders had been reviewed by the D. C. Circuit, Penn Water reiterated its position that such issue should be decided by this Court, and this Court granted certiorari. That case (Nos. 428 and 429) is now in this Court on the merits, set for argument April 3, 1952.

Just as the issue regarding the effect of the illegality of the Baltimore contract on the FPC orders against Penn Water should be determined by this Court in the case reviewing such orders, so also the issue regarding the effect on such orders of the illegalities of the Safe Harbor contract should be determined there. That issue cannot be determined in the present case, in which no FPC orders are on review.

It is obvious from the petitions herein that the petitioners wish to argue before this Court in briefs and orally the *minutiae* of their contentions that the two contracts

are not substantially identical, notwithstanding their previous concessions to the contrary. The petitioners have had their "day in court" on that issue, with a full review by an appellate court. These *minutiae* were argued in the District Court for three hours on one day and eight hours on another, and for three hours before the Fourth Circuit. The petitioners are not entitled to a further review of this essentially private question, which is not one of general Federal law or public interest meriting the attention of this Court.

Consolidated and the Maryland Commission also want to contest before this Court the Fourth Circuit's entirely orthodox application of the antitrust law decisions of this Court to the Safe Harbor contract. However, Government counsel for the FPC in their Memorandum as *amicus* (which was also a motion joined in by counsel for the Maryland Commission), after referring to FPC orders which purported to exempt the illegal contract from the antitrust laws, frankly admit (p. 3) that the contract, "as an agreement between the parties, would otherwise violate the Sherman Act." It is not believed that this Court will want to review this orthodox antitrust decision regarding the Safe Harbor contract any more than it did the similar decision on the Baltimore contract, as to which it denied certiorari.*

---

* The FPC's seven-page Memorandum contains no real argument as to why the petitions should be granted but simply a claim that there is one difference between the two Fourth Circuit cases which justified denying certiorari in the Baltimore contract case but warrants the granting of certiorari here. The asserted difference is that the FPC orders issued in 1949 approving and ordering continuance of the Baltimore contract excepted any provisions thereof which might later be held to be unlawful by some court in some other case, whereas other FPC orders prescribed the entire Safe Harbor contract, including any provisions thereof which might be found to be unlawful. The petitions for certiorari in the Baltimore contract case did not present that case to this Court with any such claimed

The petitioners contend that there are other issues involved, but such points are also without substance. For example: The petitioners contend that the restrictive provisions in the Safe Harbor contract are separable, although they strenuously maintained that the similar provisions of the Baltimore contract were inseparable; and they contend that the validity or invalidity of the Safe Harbor contract should not have been decided on the face of the papers, although they contended that the validity or invalidity of the Baltimore contract must be so determined and objected to the introduction of any evidence in the Baltimore contract case.

Reasons for Denying the Writ.

1. There is no merit in the contention that the writ should be granted because the decision below allegedly conflicts with decisions of the District of Columbia Circuit, the Third Circuit and the Middle District of Pennsylvania.

(a) The District of Columbia Circuit decision.

Petitioners contend that the writ should be granted because the Court below held that the FPC had no authority under the Federal Power Act to exempt the Safe Harbor contract from the antitrust laws and state law, whereas the

---

exception in the FPC orders. On the contrary, the petition of Consolidated stated (p. 20):

> "The Commission necessarily *approved every provision of the Basic Agreement*, except the pecuniary amount of the rates". [Italics Consolidated's.]

Consequently, this Court could not have denied certiorari in the Baltimore contract case on the basis of the presently claimed exception. It is apparent on the face of the FPC orders that they approved and ordered continuance of illegal provisions of the Baltimore contract.

D. C. Circuit has held that the invalidity of the Safe Harbor contract had no effect on FPC orders now on review in this Court founded on the Safe Harbor contract as well as the Baltimore contract.*

The contention is not substantial. The issues are different in the two cases, and necessarily so. The issue in the Safe Harbor contract case (this case) is the similarity of the Safe Harbor contract to the Baltimore contract and its resulting illegality under the Federal antitrust laws and fundamental state law. The issue in the case now before this Court (Nos. 428 and 429) to review the FPC rate orders against Penn Water, is the effect on such orders of the illegality of the Baltimore contract and the Safe Harbor contract, and such effect can only be determined in that case. That issue could not be determined in this, the Safe Harbor contract case, in which no FPC orders are on review.

(b) The Third Circuit Decision.

Petitioners claim that the decision below, holding the Safe Harbor contract illegal, conflicts with a decision of the Third Circuit.**

How the petitioners can bring themselves to make this claim is difficult to understand. There was no issue of any sort before the FPC or Third Circuit in that case regarding the illegality of the Safe Harbor contract.*** The FPC order which was the subject of review in the Third

---

* *Pennsylvania Water & Power Co., et al.* v. *FPC, et al.*, 193 F. 2d 230 (1951); cert. granted February 4, 1952.

** *Safe Harbor Water Power Corporation* v. *Federal Power Commission*, 179 F. 2d 179 (1949); cert. den. 339 U. S. 957.

*** Counsel for Consolidated in the District Court so conceded with respect to the Third Circuit case (Tr. 890):

"The Court: But the issue before the Commission was not the reasonableness of the contract.

"Mr. Ramsey: No, this point was not raised."

Circuit case was entered November 4, 1946, whereas the issue of the illegality of the Baltimore and Safe Harbor contracts was not raised until after November, 1948, when Consolidated had used its contractual controls to prevent Penn Water from building a large new steam electric generating plant at Holtwood, Pa., to be fueled by coal dredged from the river (free, except for the cost of processing) and, instead, insisted on taking the business for itself by building a new steam plant of its own in Baltimore, to be fueled by more expensive bituminous coal bought in the market.

As the Fourth Circuit said below (R., p. 242), the Third Circuit case was

> "concerned with the jurisdiction of the Commission over Safe Harbor as a licensee and public utility under the [Federal Power] Act, and with the difficult task of ascertaining the company's rate base and prescribing a reasonable rate of return. There was no discussion of the legality of the restrictions in the Safe Harbor contract, either in the opinion of the Commission or in the opinion of the reviewing court, 179 F. 2d 179."

(c) The decision of the Middle District of Pennsylvania.

The Maryland Commission (but not Consolidated or the FPC) makes a further contention that the decision below is in conflict with a decision of the Middle District of Pennsylvania.* There is nothing to this contention. The only issue in the Middle District of Pennsylvania was whether the taking effect of an order of the Pennsylvania Commission relating to the rates of Safe Harbor should be enjoined in view of the existing order of the FPC also relat-

---

* *Consolidated Gas Electric Light & Power Company* v. *Siggins, et al.*, 99 F. Supp. 151 (1951).

ing to Safe Harbor's rates which had been sustained in the above-mentioned decision of the Third Circuit.*

2. The contention that the decision below conflicts with decisions of this Court is untenable.

(a) The Fourth Circuit decision that the contract is illegal *per se* under the antitrust laws is correct.

Petitioners contend that the Fourth Circuit erred in applying decisions of this Court holding contractual provisions of the type found in the Safe Harbor contract to be illegal *per se* and in not testing the legality of the provisions under the rule of reason. It is significant that the FPC in its Memorandum as *amicus* concedes (p. 3) that the arrangement without FPC approval is one "which, as an agreement between the parties, would otherwise violate the Sherman Act."

The same contention regarding the rule of reason was made in the unsuccessful petitions for certiorari of Consolidated and the Maryland Commission in the Baltimore contract case.

Penn Water, in answer, pointed out that contractual provisions of this type, namely, provisions giving Consolidated the power (1) to control the prices charged for electricity by Penn Water, (2) to control the expansion of Penn Water's plant and thus its output of electricity, (3) to control (a) the customers to whom, and (b) the territories in which, Penn Water might sell electricity, and (4) to fore-

* The Maryland Commission also mentions in passing the decision of the D. C. Circuit in *SSW, Inc.* v. *Air Transport Assn.* (July 12, 1951). But that case is in line with the decision of the Fourth Circuit in this case that where there is no specific authority in a regulatory act to grant remedies thereunder or exempt practices illegal under the antitrust laws, the courts, not the regulatory body, have jurisdiction.

close Penn Water from a substantial market, were illegal *per se* under the controlling decisions of this Court.* In the same category was the payment provision, which removed all incentive on the part of Penn Water to compete, to seek new business and to operate efficiently.** The FPC has admitted in this case (Br. before Fourth Circuit, p. 14) that the payment provision prevents "setting up an economic interest upon his [Safe Harbor's] part" and even argued (pp. 33-34) that the restrictions on Safe Harbor were valid because due to the payment scheme "its interests are not adversely affected" by the manner in which it may be operated under the control vested in Consolidated by the Safe Harbor contract.

Here, again, as in their petitions in the Baltimore contract case, Consolidated and the Maryland Commission, instead of discussing decisions of this Court relating to the types of contractual restraints contained in the Baltimore and Safe Harbor contracts and holding such restraints *per*

---

* *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 220-224 (1940); *U. S.* v. *Real Estate Boards*, 339 U. S. 485 (1950); *U. S.* v. *Paramount Pictures*, 334 U. S. 131, 143 (1948); *International Salt Co.* v. *U. S.*, 332 U. S. 392, 396 (1947); *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707, 720 (1944); *U. S.* v. *Masonite Corp.*, 316 U. S. 265, 274-276 (1942); *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392, 397-8 (1927). See also decision of Special Statutory Court in *U. S.* v. *Aluminum Co.*, 148 F. 2d 416, 427 (2d Cir. 1945), and the decision of the Fourth Circuit holding an agreement containing similar restraints between two regulated utilities to be invalid under the antitrust laws, *Norfolk Southern Bus Corp.* v. *Va. Dare Transp. Co.*, 159 F. 2d 306 (1947); cert. den. 331 U. S. 827.

** *U. S.* v. *Paramount Pictures*, 334 U. S. 131, 149-150 (1948); *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 327, 328 (1904); *U. S.* v. *Reading Co.*, 253 U. S. 26, 48 (1920); *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co.*, 159 F. 2d 306, 309-310 (4th Cir. 1947); cert. den. 331 U. S. 827 (1947); *Lee Line Steamers, Inc.* v. *Memphis, H. & R. Packet Co.*, 277 Fed. 5, 8 (6th Cir. 1922); *Chicago, M. & St. P. R. Co.* v. *Wabash, St. L. & P. R. Co.*, 61 Fed. 993, 997 (8th Cir. 1894).

se illegal, call attention to a wholly inapplicable line of decisions by this Court relating to the acquisition by one company of stock or assets of another or arrangements (not involving contractual restraints of the type contained in these contracts), where this Court tested the illegality of the transaction under the rule of reason (CG. Pet., p. 31 and MC. Pet., p. 34).*

The implication in the Maryland Commission petition (p. 33) that there is some sort of "vertical integration" here is obviously unfounded. Consolidated operates at the same level in the industry as Safe Harbor and Penn Water. All three generate power for sale at wholesale and in bulk.

Petitioners contend that the Safe Harbor contract is a lawful one because Penn Water and Consolidated organized Safe Harbor, and there was no actual pre-existing competition before the contract was made. Petitioners cite some cases holding the suppression of pre-existing competition illegal, as if such cases showed that where there was no pre-

---

* The *Standard Oil case*, 221 U. S. 1 (1911), the *Yellow Cab* case, 332 U. S. 218 (1947), the *Paramount* case, 334 U. S. 131 (1948), and the *Columbia Steel* case, 334 U. S. 495 (1948), applied the rule of reason to determine whether the defendants were monopolizing or restraining trade by *acquiring assets or stock* of competitors or of corporations using the defendants' products. In the *Paramount* case, as in the *Columbia Steel* case (334 U. S. at pp. 522-3), this Court reaffirmed the principle of *per se* illegality and applied it to the *contractual* arrangements of the defendants, stating (334 U. S. at page 143), "We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se*." The *Appalachian Coals* case, 288 U. S. 344, did not involve any contractual restraints upon production and it is not an authority for the proposition that price-fixing is subject to the rule of reason. See *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224 (1940), and the more recent decisions of this Court referred to above. See also the *Aluminum* case, 148 F. 2d, at page 427. None of the other cases referred to in the petitions in this connection involved *contractual* provisions for price-fixing or *contractual* restraints in any way similar to those provided for in the Safe Harbor contract.

existing actual competition the suppression of future competition is legal.*

Petitioners also cite *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593 (1951), as though that case dealt solely with pre-existing competition. However, this Court there held illegal the agreements in restraint of trade between U. S. Timken, British Timken (controlled by U. S. Timken and one Dewar) and French Timken (which was organized and wholly owned by U. S. Timken and Dewar). This Court made it entirely clear (341 U. S. 595-599) that the agreements were "continuously kept operative" from the time of the organization of French Timken, which was never independent. Consolidated states that French Timken had taken over the trademark rights of a pre-existing competitor. This statement is not supported by the opinion and in any event if the prior existence of a trademark was significant, Safe Harbor, as petitioners concede, was in existence and had considerably more substance prior to the making of the contract in 1931 than a trademark.**

Consolidated's contention regarding the necessity for pre-existing competition is rejected in many cases.*** It has

---

* *Northern Securities Co.* v. *U. S.*, 193 U. S. 197 (1904); *U. S.* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912); *U. S.* v. *Reading Co.*, 253 U. S. 26 (1920); *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944).

** Safe Harbor applied for and obtained from the Pennsylvania Commission a certificate of public convenience early in 1930. Safe Harbor was formed in January, 1930 by the merger of two predecessor companies organized in February, 1929, and construction of its dam and hydroelectric development was begun in April, 1930. Consolidated's contention in this connection (Pet., p. 19) that Safe Harbor could not compete because its original certificate limited its sales to Consolidated and Penn Water is obviously unsound since Safe Harbor shortly obtained a certificate permitting sales to others (Tr., p. 705). It is admitted by Consolidated in its petition (p. 19) that Safe Harbor power would come into competition "of course, after it should come into the hands of Penn Water and Consolidated as purchasers".

*** *U. S.* v. *National Lead Co.*, 63 F. Supp. 513, 517, 533-534 (S. D. N. Y. 1945); aff'd 332 U. S. 319; *Kogod* v. *Stanley*

been frequently held that the suppression of potential competition is just as illegal as the suppression of competition which already exists.* Petitioners fail to discuss any of these cases.

Petitioners also seem to try to make a point that suppression of competition between "affiliated" companies is not illegal, but they cite no cases for the proposition, simply claiming that cases generally understood to be holdings to the contrary are not such holdings. The cases cited actually stand for the proposition that suppression of competition within an affiliated group, as well as with companies not affiliated, is illegal.**

In the *Kiefer-Stewart* case, the decision of this Court referred to two affiliated companies as competitors and held that a price-fixing arrangement between them was unlawful because price-fixing is *per se* illegal, stating that such agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." 340 U. S. 213, 215. This reasoning is clearly applicable to the Safe Harbor contract.***

Co. of America, 186 F. 2d 763 (D. C. Cir. 1950); *U. S.* v. *Richfield Oil Corp.*, 99 F. Supp. 280, 292, 293 (S. D. Cal. 1951); *U. S.* v. *Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950).

---

* *U. S.* v. *Griffith*, 334 U. S. 100, 107 (1948); *U. S.* v. *Reading Co.*, 226 U. S. 324, 348-349, 351, 370-371 (1912); *U. S.* v. *Aluminum Co.*, 148 F. 2d 416, 429 (Special Statutory Court, 2d Cir. 1945); *U. S.* v. *General Dyestuff Corp.*, 57 F. Supp. 642, 648 (S. D. N. Y. 1944).

** *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *U. S.* v. *Griffith*, 334 U. S. 100 (1948); *Schine Theatres* v. *U. S.*, 334 U. S. 110 (1948); *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

*** Petitioners at times refer to the parties to the contract as "affiliated" and to Safe Harbor as a "wholly-owned subsidiary" or as "jointly owned" by Consolidated and Penn Water. This is clearly erroneous. Consolidated and Penn Water are not affiliated in any respect. Safe Harbor is not a wholly-owned subsidiary of either of them. Safe Harbor is not jointly owned by Consolidated

(b) The decision of the Fourth Circuit that the Safe Harbor contract is illegal, as in violation of Pennsylvania corporation and utility statutes, common law and public policy, is correct.

Petitioners contend that the decision of the Fourth Circuit that the Safe Harbor contract was illegal as in contravention of Pennsylvania corporation and utility statutes,* common law and public policy, and *ultra vires* Safe Harbor, is a violation of the Commerce Clause of the Federal Constitution and conflicts with decisions of this Court holding (i) that the regulatory powers of the Federal government supersede the regulatory powers of the states in the case of companies engaged in interstate commerce, or (ii) that the states have no regulatory powers in certain fields of interstate commerce.**

---

and Penn Water. Each owns separately and not jointly one-half of the voting stock of Safe Harbor. This stock in the hands of either is not tied to the Safe Harbor contract and is free to be sold at any time by either without affecting the Safe Harbor contract, so that at any time all or any part of the voting stock in Safe Harbor may be owned by persons having no connection with the Safe Harbor contract. The original bonds of Safe Harbor referred to by the petitioners as guaranteed by Consolidated with indemnity from Penn Water have been retired.

---

* The pertinent Pennsylvania statutes are quoted in the record at Tr., pp. 358-361.

** The common law and public policy condemning the Baltimore and Safe Harbor contracts are not peculiar to the State of Pennsylvania but are the general doctrines of common law and public policy applicable to public utility corporations as laid down in a long line of decisions of this Court and other courts, headed by *Gibbs* v. *Consolidated Gas Company of Baltimore*, 130 U. S. 396 (1889), where this Court condemned similar contractual arrangements attempted by Consolidated (or a predecessor) in the gas field, as violative of common law and public policy. In its brief in the Baltimore contract case Consolidated conceded that those contractual arrangements were "vicious". Other cases to the same effect are: *Thomas* v. *Railroad Co.*, 101 U. S. 71, 83 (1879); *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 48-51 (1891); *Arizona Grocery Co.* v. *A. T. & S. F. R. Co.*, 284 U. S. 370, 384 (1932); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 458-460 (1945); *U. S. Tel. Co.* v. *Central Union Tel. Co.*, 202 Fed. 66, 72-73 (6th Cir. 1913); *Magaha* v. *City of Hagerstown*, 95 Md. 62, 72, 51 A. 832, 835 (1902).

The petitioners cite the same decisions (CG. Pet., p. 34) in support of their contention as they cited in their petitions for certiorari which this Court denied in the Baltimore contract case. As pointed out in Penn Water's reply to those petitions, there was not in the Baltimore contract case, and there is not in this case, any question of regulation of rates and services in interstate commerce. Consequently, there can be no question of conflict between state statutes, public policy or regulation and Federal statutes, public policy or regulation.

In this case we are not in the field of law relating to *regulation* of rates and services, but in the field of law relating to the inherent lack of authority of public utility corporations to violate the fundamental laws of their state of incorporation. Therefore, the reference to the Commerce Clause of the Constitution and to the *Attleboro* case, 273 U. S. 83 (1927) is irrelevant, and other cases cited in Consolidated's petition (p. 34) relating to states putting obstacles in the way of the flow of interstate commerce are also beside the point.

For the first time in this case the specious argument is now made by petitioners that the subject matter of the state law violations is covered by a provision of the Federal Power Act (Section 8) (16 U. S. C. §801) to the effect that no transfer of any license granted under that Act to use navigable waters, or of the rights granted under such a license, shall be made without the approval of the FPC. This provision has no applicability to the corporate rights and duties of Safe Harbor flowing from its incorporation as a utility corporation under the laws of Pennsylvania, or to the duty to exercise managerial powers vested in its Board of Directors by such laws, all of which were surrendered to Consolidated under the Safe Harbor contract.

That this is so is demonstrated by the next succeeding Section 9(b) (16 U. S. C. §802(b) of the Federal Power Act requiring, as a condition of the granting of a license, proof that the applicant has complied with the requirements of the laws of the state and has the right under such laws to engage in the business necessary to operate under the license. This is a recognition that such rights must flow from the laws of the state of incorporation and not from a license issued by the Federal government.

(c) The Fourth Circuit is correct in holding that the courts are not ousted from jurisdiction over antitrust law questions by the Federal Power Act.

There is here no new question, not presented to this Court in the unsuccessful petitions for certiorari in the Baltimore contract case, as to any exclusive primary jurisdiction in the FPC over antitrust law questions. Penn Water pointed out in its answer to such petitions that there simply was no provision in the Federal Power Act or the antitrust laws giving the FPC any authority to exempt any transactions from the antitrust laws or deal with any antitrust law questions.

Penn Water's position in this regard was reenforced shortly after such answer was filed, and certiorari denied, by the enactment by Congress of an amendment to the Clayton Act giving to the FPC a limited power to exempt from Section 7 of the Clayton Act acquisitions of stock or assets which it might approve. Thus Congress clearly indicated that prior thereto the FPC had no power at all to exempt any transaction from the antitrust laws and thereafter had power only to exempt such stock or asset acquisitions. Petitioners make no attempt to refute the clear implication from this new Congressional enactment.

The petitioners erroneously claim that *U. S.* v. *Borden Co.*, 308 U. S. 188 (1939) and *U. S. Alkali Export Ass'n.* v. *U. S.*, 325 U. S. 196 (1945), relied upon by the Fourth Circuit (R., p. 247), are inapplicable. These cases held that the courts are not ousted of jurisdiction over antitrust questions by a regulatory statute which contains no provisions for dealing with such questions. The petitioners state that those cases are distinguishable because they were suits by the *Government,* whereas the present suit is by a *private party.* The same claim was made by petitioners in their unsuccessful petitions for certiorari in the Baltimore contract case.

The claim in any event has been disposed of by the recent decision of this Court in *Far East Conference, et al.* v. *U. S., et al.* (No. 15 Misc., Oct. Term 1951; decided March 10, 1952 after the present petitions were filed). In that decision this Court held that there was no difference in this regard between a suit by the government and a suit by a private party.

Correspondingly, Consolidated's contention (also made in its unsuccessful petition in the Baltimore contract case) that the Fourth Circuit's decision conflicts with *U. S. Navigation Co., Inc.* v. *Cunard SS. Co.*, 284 U. S. 474 (1932) is untenable. As this Court recently pointed out, the *Cunard* case was substantially identical with the *Far East Conference* case. Both cases involved a regulatory statute which contained a specific provision authorizing the regulatory agency to deal with antitrust law questions and to grant exemption from the antitrust laws. In contrast, the Federal Power Act contains no such authorization whatever, either express or implied. Instead, that Act reaffirms the antitrust laws so far as contractual arrangements are concerned by providing in substance in Section 10(h) that the prohibitions of the Sherman Act shall be incorporated

as a condition of every license issued under the Federal Power Act.* Moreover, as both Fourth Circuit decisions held, the contracts involved in both cases are of the type which is illegal on its face regardless of any extraneous facts.

In *Terminal Warehouse Co.* v. *Penn R. Co.*, 297 U. S. 500 (1936) and *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), cited by petitioners, just as in the *Cunard* case, the regulatory statute involved (the Interstate Commerce Act) specifically provided a remedy by proceedings before the regulatory agency.**

3. The other miscellaneous contentions of the petitioners are without merit.

(a) The contention that the illegal provisions are separable.

Petitioners erroneously contend that the illegal provisions of the Safe Harbor contract are separable from the

---

* Consolidated's petition (pp. 28-29) advances an erroneous contention, which was also advanced in the petitions for certiorari in the Baltimore contract case, to the effect that Section 10(h) gives the FPC authority to enforce the antitrust laws and to pass on antitrust matters. The Fourth Circuit disposed of this argument by pointing out that Section 10(h) was not an operative provision of the Federal Power Act but merely a provision to be incorporated in all licenses, and that the FPC's function was limited to calling all violations of a license to the attention of the Attorney-General for such court action as he might care to take to enjoin the violation or revoke the license. The Fourth Circuit also pointed out that the Secretary of War has a power under the Act similar to that of the FPC (and it would be absurd to claim that the Secretary of War thereby has antitrust powers) and that any proceedings to enforce provisions incorporated in a license pursuant to Section 10(h) must be brought before a court, not the FPC (184 F. 2d 552, 562, 563 (1950)).

** Equally inapplicable is *Northwestern Pub. Serv. Co.* v. *Montana-Dakota Util. Co.*, 181 F. 2d 19 (8th Cir., 1950), cited by petitioners. That case related only to rates and did not involve any question under the antitrust laws or of jurisdiction to deal with such questions.

balance of the contract and that their severance would leave a workable agreement. Allied to this contention is another erroneous one—that the question of whether these provisions are separable is a matter of fact, not of law.

This present contention should be contrasted with the insistence of these same parties in the Baltimore contract case that the similar illegal provisions of that contract were inseparable and that the contract was not workable without them. (Consolidated Br. in the Fourth Circuit, p. 35; see also Supplementary Opinion of Fourth Circuit, 186 F. 2d 934 (1951) at p. 936.) In that case petitioners sought to justify the illegal provisions as necessary for the protection of Consolidated to make the agreement workable. The petitioners actually made the same contention in this case that the restrictive provisions in the Safe Harbor contract were justified as necessary for the protection of Consolidated. (Consolidated Br. in District Court, pp. 13-15.)*

In now making the contention that the restrictive provisions are separable the petitioners talk as though the only illegal provisions of the Safe Harbor contract were the restraints on sales of power and on expansion, and the provisions for an Operating Committee giving Consolidated a veto over the managerial decisions of Safe Harbor. They seek to ignore the other illegal provisions including the payment provision which robs Safe Harbor of incentive to compete, seek new business and operate efficiently, and which was listed among the restrictive provisions by the Fourth Circuit in its opinion in this case (R., pp. 235-6).

---

* The situations in the cases cited by the Maryland Commission (Pet., p. 39) have no similarity to this case. All of them involve severability of illegal conditions of various arrangements which are not analogous to the Safe Harbor contract. The cases simply stand for the obvious proposition that where an illegal part of an arrangement is independent of the rest of the arrangement, it is severable and the balance of the arrangement may be left intact.

The District Court expressly held that the illegal provisions were the very "warp and weft" of the agreement and inseparable (R., p. 8), which holding was affirmed by the Fourth Circuit.

As to the contention that the question of separability is one of fact and not of law, petitioners are simply wrong. That question is one which must be determined by a court from an examination of the instrument as the District Court held, citing *U. S.* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 298 (1942) (R., p. 8).*

(b) The contention that summary judgment should not have been granted.

The petitioners erroneously contend that summary judgment should not have been granted, but that there should have been a trial to determine whether the Safe Harbor contract was substantially similar to the Baltimore contract and to go into other alleged issues. This should be contrasted with the contention of the petitioners in the Baltimore contract case that the illegality of the Baltimore contract should be tested on its face and their objection to the admission of any evidence in that case.

Obviously there was no need of a trial to determine whether the contention of Penn Water was correct that the Safe Harbor contract was similar to the Baltimore contract and illegal on its face. The contention that a trial should have been held apparently flows mainly from the petitioners' claim that the contractual restraints here should be tested under the rule of reason. However, since they are of a type which this Court has held are illegal

---

* See also *First Seattle D. H. Nat. Bank* v. *C. I. R.*, 77 F. 2d 45, 47, 48 (9th Cir. 1935); *Franklin* v. *American National Insurance Co.*, 135 F. 2d 531, 533 (10th Cir. 1943).

per se, there is no need to go into circumstances surrounding the making of such a contract or its consequences.*

The other alleged issues as to which petitioners claim a trial should have been had were immaterial to the determination of whether the Safe Harbor contract was illegal on its face and were simply issues which the petitioners attempted to inject into the case to prevent summary judgment.

Thus petitioners say that they denied many paragraphs of the complaint. While the complaint proceeded on a number of grounds, the motion for summary judgment was based solely on the contract and certain basic record facts admitted by the petitioners in their answers to the complaint. (Penn Water's reply memorandum in the District Court, pp. 10-11). As the District Court said (R., p. 8): "there is no genuine issue of fact in the foundation upon which the motion for summary judgment is made".

(c) Miscellaneous contentions regarding the Safe Harbor contract.

(i) Petitioners contend that the Safe Harbor contract was entirely independent of the Penn Water contract and that the Fourth Circuit should not have said that the Safe

---

* *U. S.* v. *Real Estate Boards*, 339 U. S. 485, 489 (1950); *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221-224, 228 and fn. 59 pp. 224-226 (1940); *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *U. S.* v. *Masonite Corp.*, 316 U. S. 265, 276 (1942); *U. S.* v. *Reading Co.*, 226 U. S. 324, 326, 358 (1912); *U. S.* v. *Aluminum Co.*, 148 F. 2d 416 (Special Statutory Court, 2d Cir. 1945); *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949); *Sugar Institute* v. *U. S.*, 297 U. S. 553, 599 (1936); *Eastern States Lumber Association* v. *U. S.*, 234 U. S. 600, 613 (1914); *Thomsen* v. *Cayser*, 243 U. S. 66, 85 (1917); *American Medical Ass'n* v. *U. S.*, 130 F. 2d 233, 248-249 (D. C. Cir., 1942); aff'd 317 U. S. 519; *U. S.* v. *National Lead Co.*, 63 F. Supp. 513, 525 (S. D. N .Y., 1945); aff'd 332 U. S. 319.

Harbor contract was invalid because dependent on the invalid Baltimore contract. Even if this contention had any merit, it would be immaterial because the statement was unnecessary to the decision of the Fourth Circuit, its decision being based on the independent ground that the Safe Harbor contract taken alone was illegal on its face (R., p. 237). The District Court, as well as the Fourth Circuit, so held.*

(ii) The petitioners contend that one of the many restrictive provisions in the Safe Harbor contract had somehow ceased to be effective and therefore should be counted out of consideration, viz., the last sentence of Article III(a) which provides that Safe Harbor may not sell any power from any addition to its plant to any other party without the consent of Consolidated and Penn Water, clearly a restrictive provision illegal *per se*.

The contention is not significant because it leaves all of the other illegalities of the contract. However, the two reasons advanced by the petitioners for the ineffectiveness of the sentence are not tenable.

Petitioners contend that an investigation into the facts would show that the sentence is not restrictive as a practical matter because expansion by Safe Harbor would not be economically justified. While such facts are immaterial

---

* The Safe Harbor contract had previously been conceded in Consolidated's Brief in the Fourth Circuit in the Baltimore contract case to be a "sister contract" to the Baltimore contract (p. 34) and "supplementary" to it (Br., p. 35) and both contracts to be "in essence an energy sales contract". Furthermore, the District Court (R., p. 4) referred to "the recitals in the second and third paragraphs of the 2-party agreement [Baltimore contract] virtually avowing the 2-party to be the master agreement operating the 3-party contract [Safe Harbor contract]. Article II expressly incorporates Safe Harbor power as an item of the 2-party agreement. The supplement, dated August 1, 1932, to the 3-party contract reaffirms the terms of the latter but in its section Fourth adopts some of the terms of the 2-party agreement."

as a matter of law since the restriction is illegal *per se*, a conclusive answer is that an important addition to Safe Harbor's plant was made in 1939. The supplemental agreement of November 22, 1939 related to this addition (an installation of a seventh generator in addition to the six previously in the plant) and provided for the disposition of the output of the addition (R., pp. 111-12).

Petitioners also contend that the last sentence of Article III(a) was "amended" by the FPC. This claim has no basis whatever and was not made in the District Court or even in the Fourth Circuit until the filing of Consolidated's reply brief.

The claim is that the FPC provided in its rate order that the original rate base on which Safe Harbor was to receive a specified percentage return from Consolidated and Penn Water under Article V should be enhanced by adding the cost of any additions made to Safe Harbor's plant. It is difficult to see how this could be an amendment of the last sentence of Article III(a) or eliminate its restrictive provisions. There is no inconsistency between adding the cost of additions to Safe Harbor's rate base and the restrictions of that sentence. The basic contractual arrangement was that Safe Harbor could sell any of its energy to others with the consent of Consolidated and Penn Water, provided the revenues received therefrom should be credited under Article III(c) against the fixed return on Safe Harbor's rate base payable by Consolidated and Penn Water under Article V. The payment of a specified return on the additional rate base is in no way inconsistent with the necessity for obtaining the consent of Consolidated and Penn Water to Safe Harbor's power sales to others.

(iii) The claim of the petitioners that in order to finance Safe Harbor, Safe Harbor had to have a long-term

contract *like this contract* is obviously untenable. The project could have been developed under a long-term contract of the usual type in the industry with unit rate payments for capacity and energy furnished and without managerial controls by one company over another.

(d) Miscellaneous contentions of the Maryland Commission.

Although the miscellaneous contentions of the Maryland Commission mentioned below are immaterial, it may be of interest to the Court to have them disposed of briefly:

(i) The Maryland Commission alleges that it is the basic purpose of Penn Water in this case to avoid FPC jurisdiction and deny to Maryland its "fair share" of Safe Harbor power. These claims are destroyed by the record in the Baltimore and Safe Harbor contract cases. Penn Water has consistently offered to Consolidated the same services Consolidated has been receiving. Such service is necessarily interstate and subject to whatever system of regulation the Federal statutes provide for.

(ii) The above claim is closely associated with another assertion of the Maryland Commission that there is some issue in this case as to the Maryland public's "fair share" of Safe Harbor power. Of course, there can be no such issue in the case.

In this connection, two myths regularly advanced by counsel for the Maryland Commission should be dissipated.

One is that the Maryland Commission permitted the output of the hydroelectric plant at Conowingo on the Susquehanna River in Maryland, owned by another utility corporation, to go into Pennsylvania in reliance on Maryland's obtaining Consolidated's alleged contractual entitlement under the Safe Harbor contract to the power generated in

the Safe Harbor plant on the Susquehanna River in Pennsylvania. The facts of public record destroy this claim. The Safe Harbor project was not begun (1930) and the Safe Harbor contract with Consolidated was not made (1931) until long after the Conowingo project had been approved (1926).

The second of the myths is that the Maryland public is somehow dependent for power on the alleged contractual entitlement of Consolidated to Safe Harbor power under the Safe Harbor contract and if such entitlements are not continued Consolidated will have to install additional steam generating facilities. The admitted fact is that for many years Consolidated has not received the alleged two-thirds entitlement to Safe Harbor power but substantially less than that amount. The alleged two-thirds entitlement has been used simply as a contractual device to give Consolidated a money credit (at relatively high cost of steam generation) for Safe Harbor power delivered to and paid for by Pennsylvania utilities.

(iii) Counsel for the Maryland Commission (Pet., p. 7) refers to Penn Water's alleged "synthetic picture of its operations" and says that Penn Water "seeks to create the far-fetched impression that it is a small company, being gradually strangled by a series of restraints forced upon it by Consolidated and designed to restrain trade."

But this picture, far from being synthetic, is obviously true. Penn Water and Safe Harbor are small companies compared to Consolidated and they have been strangled by Consolidated and prevented from competing with it by the Baltimore and Safe Harbor contracts. There was mentioned above one of the uses made of the restrictive provisions, to prevent the construction of a new steam generating plant by Penn Water so that Consolidated could take the business by building a new steam plant of its own.

Conclusion.

We do not believe that this Court will want to take up its time in a review of the details of the claim that the Safe Harbor contract is not substantially similar to the Baltimore contract, the only new question presented by the petitioners which was not in the previous petitions for certiorari which were denied in the Baltimore contract case.

It is respectfully submitted that the petitions for certiorari should be denied.

WILKIE BUSHBY,
JAMES PIPER,
Counsel for Respondent,
Pennsylvania Water & Power Company.

March 22, 1952.

14

Office - Supreme Court, U. S.
FILED
MAR 24 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

Nos. 611 and 615

CONSOLIDATED GAS, ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners

vs.

PENNSYLVANIA WATER & POWER COMPANY

and

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents

BRIEF OF RESPONDENT, PENNSYLVANIA PUBLIC UTILITY COMMISSION IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

WILLIAM J. GROVE,
THOMAS M. KNEEDLER,
LLOYD S. BENJAMIN,
Counsel for Respondent, Pennsylvania Public Utility Commission.

North Office Building,
Harrisburg, Pa.

Mercantile Printing Company, Law Printers, 20-24 Locust St., Reno, Pa.

INDEX TO BRIEF

	Page
Argument	1

TABLE OF CITATIONS

Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission v. Consolidated Gas Electric Commission of Maryland, 184 F. 2d 552 (1950), cert. denied 340 U. S. 906 (1950)	1, 5

Case Caption

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1951

Nos. 611 and 612

Consolidated Gas Electric Light and Power Company of Baltimore and Public Service Commission of Maryland

Petitioners,

v.

Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT PENNSYLVANIA PUBLIC UTILITY COMMISSION IN OPPOSITION

The petitions of Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) and of Public Service Commission of Maryland (Maryland Commission) for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit and the memorandum of the Federal Power Commission (FPC) in support of the foregoing petitions seek review of a decision which in all material respects followed a previous decision holding invalid a companion wholesale power agreement (Baltimore contract). This Court, as regards that contract, denied the petitions for a writ of certiorari.

> *Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission v. Consolidated Gas Electric Commission of Maryland,* 184 F. 2d 552 (1950), *cert. denied* 340 U. S. 906 (1950).

The issues raised in the instant petitions are, with a single exception, substantially identical

with those asserted in the prior case. The only issue not previously presented in the prior case is whether the Safe Harbor Contract, the subject matter of the instant case, and the Baltimore Contract are substantially identical.

Assertions that difference does exist were made in both the District Court and the United States Court of Appeals Fourth Circuit and in each instance the Court unanimously determined that (1) The contracts were "inextricably inter dependent", and (2) The Safe Harbor contract contains restraints sufficient in themselves to require a judicial determination of illegality *per se*.

No useful purpose would be served by a detailed analysis of the contracts or an analysis seriatum of the respective reasons assigned for allowance of the several petitions. Such would necessarily constitute a duplication or repetition of matters and arguments set forth in the brief of Pennsylvania Water & Power Co. filed in opposition to the instant petitions for a writ of certiorari.

Pennsylvania Public Utility Commission does, however, desire to refer your Honorable Court to certain inaccuracies and misstatements contained in the respective petitions.

Consolidated suggests that the holding of the Court below was "solely by reason of *four* separable provisions"; that "these *four* provisons * * * were minor and unimportant ones"; that the Fourth Circuit failed to find illegality in the connection with the two contracts and merely "imputed illegality"; and, that the Pennsylvania Commission approved the Safe Harbor agreement.

The Fourth Circuit held that the provisions were not separable, that with regard to the unimportance of the illegal provisions that "In addition, as the District Judge found, the restraints contained in the Safe Harbor contract itself are sufficient to invalidate it". Quoting from the language of the District Court the Fourth Circuit held that "These stipulations are strangulations. They choke each of the recipients in its full exercise of its ownership in the power purchased of Safe Harbor; they choke Safe Harbor too. They do not merely limit one party from impinging the other's rights; their reach is more than defensive."

The Fourth Circuit clearly held that by reason of the provisions of the contracts themselves, which contained reference to each other, together with assertions of Consolidated in prior briefs, that the two contracts were "inextricably inter

dependent," the Safe Harbor contract was "part of an illegal plan which violates the federal anti-trust statutes and the public service laws of the State of Pennsylvania."

There was no imputation of illegality; rather a determination of the illegality of the Safe Harbor contract itself. The Fourth Circuit proceeded to adopt the language of the District Court holding that irrespective of the Baltimore contract the provisions in the instant Safe Harbor contract were sufficient of themselves to invalidate it.

Pennsylvania Public Utility Commission submits that the sole issue here raised which was not before this Court in the prior case (*Pennsylvania Water & Power Co. et al., Pennsylvania Public Utility Commission v. Consolidated Gas Electric Light and Power Company of Baltimore, Public Service Commission of Maryland,* 184 F. 2d 552 (1950) *cert. denied,* 340 U.S. 906 (1950)) is whether the Safe Harbor contract is substantially similar to the Baltimore contract. This issue was determined in the affirmative by both the District Court and the Fourth Circuit at Baltimore. There is no question of a federal nature here involved.

Pennsylvania Public Utility Commission respectfully submits that the respective petition,

for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

WILLIAM J. GROVE,
Assistant Counsel,
THOMAS M. KERRIGAN,
Assistant Counsel,
LLOYD S. BENJAMIN,
Acting Counsel,
Pennsylvania Public Utility Commission.

TABLE OF CITATIONS

Statute

	Page
Federal Power Act, U.S.C. Title 16, sec. 803(b)	3, 5

Cases

Agoston v. Pennsylvania, 340 U. S. 844 (1950)	8
Board of Trade of Chicago v. U. S., 246 U. S. 231, 238 (1918)	13
International Salt Co. v. U. S., 332 U. S. 392 (1947)	12
U. S. v. Bausch & Lamb Co., 321 U. S. 707 (1944)	12
U. S. v. Carver, 260 U. S. 482, 490 (1923)	8
U. S. v. Masonite Corp., 316 U. S. 265 (1942)	12
U. S. v. Real Estate Boards, 339 U. S. 485 (1950)	12
U. S. v. Socony-Vacuum Co., 310 U. S. 150 (1940)	12
U. S. v. Trenton Potteries Co., 273 U. S. 392 (1927)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 611 and 612

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioners,

v.

PENNSYLVANIA WATER & POWER COMPANY and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONSOLIDATED'S REPLY BRIEF TO PENN WATER'S BRIEF IN OPPOSITION

Penn Water's Brief in Opposition contains so many misleading statements and unsound contentions that a complete and adequate refutation would require an extended reply brief, which would not be appropriate. We will limit ourselves herein to short replies to six of the basic errors in Penn Water's brief.

I.

Penn Water's brief (p. 3) states that the Safe Harbor Agreement "by its express terms, give(s) Consolidated these restrictive control powers over the seller" (Safe Harbor), namely, "control to Consolidated over the seller's contracts, sales, prices, territories, markets, output and expansion".

The *answer* is that the Safe Harbor Agreement (R. 91-112), except to the extent that it constitutes a sale of Safe Harbor's entire output of hydro-energy to its two owners, does *none* of these things. The most that can be said is that the Safe Harbor Agreement constitutes an exclusive sales contract. But, there being no question of monopoly, this feature, under controlling decisions of this Court, does not render it illegal *per se*. The Fourth Circuit did not condemn it because it was an exclusive sales contract. Penn Water's contractual share and Consolidated's contractual share of Safe Harbor's entire output were held to be each company's "rightful entitlement" (R. 237).

The Safe Harbor Agreement provides that Safe Harbor will sell, and Penn Water and Consolidated will purchase, *all* the output from Safe Harbor's 7-generator plant. Since the FPC's order of November 4, 1946 (Tr. 567-8), modifying the Safe Harbor tariff, and by Penn Water's and Consolidated's acquiescence therein, Penn Water and Consolidated are also the exclusive contract purchasers of any output which may result from any hypothetical hydro-generating additions to this 7-generator plant. The Safe Harbor Agreement contemplates, and provides for, no sales by Safe Harbor of any of its output to others, except such as "may be required for the performance of any duty or obligation to serve imposed on it (Safe Harbor) by its charter or otherwise by law". It is only from such outside sales of hydro-energy which may be required by law, that Penn Water and Consolidated become entitled to be credited on bills to them

with Safe Harbor's revenues.[1] In return for this purchase of all of Safe Harbor's output, Penn Water and Consolidated agree to pay Safe Harbor all of its operating expenses, taxes, depreciation and the net return upon its investment in hydro plant. Thereafter, in the Safe Harbor Agreement, come the *separable* provisions which have never operated and which were the only provisions thereof which the Fourth Circuit, in the present case, purported to find illegal *per se*. They are:

(a) Under the heading "*Other* Entitlements" (R. 95), which imports separability, Safe Harbor obligates itself to install any proper and reasonable additional machinery or equipment in its plant upon the joint request of its customers, Penn Water and Consolidated (see Art. III(a), first sentence). Safe Harbor itself remains entirely free to expand its plant to the extent expansion is feasible and permitted by charter and franchise powers and by regulatory authorities, and, since the FPC's order of November 4, 1946, requires Penn Water and Consolidated to pay Safe Harbor a return on its investment in such additions, Safe Harbor has every incentive to do so. Such requests of its customers, to be effective, must be reasonable ones. Otherwise they would violate Art. IV of the Agreement providing for the most economical and efficient facilities (R. 96-97), and would fail to obtain the approval of the FPC which is required by U.S.C. Title 16, Sec. 803(b).

(b) Under the same separable heading (R. 95), Safe Harbor originally agreed not to sell any of its output, if there

---

[1]Hence the statement on page 25 of Penn Water's brief that "The basic contractual arrangement was that Safe Harbor could sell any of its energy to others with the consent of Consolidated and Penn Water, provided the revenues received therefrom should be credited under Article III(c) against the fixed return on Safe Harbor's rate base payable by Consolidated and Penn Water under Article V," is erroneous. Sales by Safe Harbor of its energy to others was not contemplated by the Agreement, except sales required by law and originally sales of output from hypothetical additional generators.

should be any such hypothetical output from additions to hydro-plant, to persons other than Penn Water and Consolidated without their consent (see Art. III(a), second sentence). This provision was, however, at all times completely academic and inoperative, because Safe Harbor, by reason of insufficient river flow (R. 141, 142), never has added, and can never feasibly add in the future, any additional generators to its 7-generator plant.[2] Furthermore, since the said order of the FPC dated November 4, 1946, the Safe Harbor tariff has been modified so as to place any hypothetical additional output on precisely the same footing as Safe Harbor's output from its existing 7-generator plant, namely, subject to the exclusive right and obligation of Penn Water and Consolidated to purchase it outright;

(c) Safe Harbor agrees that it will not make such independent side agreements with either of its two customers as will have the effect of impairing the obligations of the parties for the most economical coordination of their facilities and most efficient operations. (See Art. IV, last sentence (R. 97), which expressly qualifies and limits this provision by the words "For this purpose", i.e., for the purpose of economy and efficiency stipulated for in the rest of Art. IV); and

(d) Penn Water and Consolidated agree (R. 105) to set up an Operating Committee composed of a representative of each of them *solely* "for investigation, consultation and advice in all operating, engineering and accounting matters

---

[2]Penn Water's brief (p. 25) attempts to negative this all important fact by stating that "an important addition to Safe Harbor's plant was made in 1939". Penn Water fails to state, however, that this addition was the originally contemplated seventh and final generator to which the parties were originally committed in 1931, but the installation of which was deferred until its output could be utilized by the Pennsylvania Railroad (R. 161, Tr. 803-4). Penn Water on page 21 in its brief filed in the Fourth Circuit conceded that this seventh and last generator was part of the "initial development".

pertaining to this Agreement", with no powers whatever to dictate to or bind Safe Harbor or any of the other parties to the Agreement (see Art. XIV). The statement in the second footnote on page 4 of Penn Water's brief that the provisions for an Operating Committee give "Consolidated a veto over managerial decisions of the seller" is completely untrue. The Safe Harbor Agreement by its terms gives Consolidated no such veto and the Operating Committee, in practice, has confined itself strictly to "consultation and advice".

Now it is obvious, we submit, that none of the foregoing provisions of the Safe Harbor Agreement gives Penn Water and Consolidated control over Safe Harbor's contracts or sales, except, of course, that Safe Harbor, having contracted to sell its entire output to Penn Water and Consolidated, cannot sell the same output to others, and except that Safe Harbor may not make independent contracts with either Penn Water or Consolidated which would work against the stipulated efficiency and economy in the coordination of the facilities of the three parties. It is also obvious that none of the foregoing provisions of the contract gives control to Penn Water and Consolidated over Safe Harbor's prices, territories, markets or expansion. The Safe Harbor Agreement, of course, stipulates the initial price at which Safe Harbor will sell its entire output to Penn Water and Consolidated, but this agreement as to price between sellers and buyers is certainly not "market price fixing", and these initial prices are expressly subject to modification by the FPC, which has modified and fixed them. The Safe Harbor Agreement leaves Safe Harbor completely free to expand its plant by adding any additional facilities which its Board of Directors decide to add, and Safe Harbor, and its directors, have repeatedly done so, subject to the exclusive jurisdiction of the FPC to approve or disapprove any expansion of the licensed project in excess of 100 horsepower (U.S.C. Title 16, Sec. 803(b)). Safe Harbor is completely free to exercise its

individual initiative, and that of its directors, to seek broader charter and franchise powers. For example, if Safe Harbor should wish to apply for charter and franchise powers to build a steam electric generating plant, it would be completely free, as far as the Safe Harbor Agreement is concerned, to do so and to sell the output therefrom to anyone it pleases. Safe Harbor is completely free to exercise its initiative to apply to any governmental regulatory authority having jurisdiction with regard to its rates and services as a Federal licensee and interstate public utility.

II.

Penn Water's brief (pp. 2, 4) states that the Safe Harbor Agreement is a "substantially identical contract" with the Baltimore Contract and is "substantially similar to the Baltimore Contract", and that "provisions to the same effect [as Arts. IV and V of the Baltimore Contract] are contained in the Safe Harbor contract".

The *answer* is that this is simply incorrect, as a mere reading of the two agreements will show. There were also differences in parties, nature and effect. Consolidated has never conceded in the instant case that the two contracts were similar. On the contrary, it was at great pains to point out to the Fourth Circuit the many and controlling differences between the two. The statement of Consolidated's counsel, quoted on page 5 of Penn Water's brief from page 35 of Consolidated's brief filed in the Fourth Circuit in the Baltimore Contract case, obviously did not mean that the two agreements constituted *one* energy sales contract, but that *each* of them is an energy sales contract with the provisions of *each* constituting terms of sale.

Arts. IV and V of the Baltimore Contract do not appear in the Safe Harbor Agreement and there are no provisions of the Safe Harbor Agreement similar to them.

Arts. IV and V of the Baltimore Contract provided that,

"So far as possible, consistently with the performance of any duty or obligation to serve imposed" on Penn Water "by its charter or otherwise by law", Penn Water should obtain the approval of Consolidated before making contracts with others for the purchase of energy from, or the sale of energy to, such other persons, and before making additional investments in plant in excess of $50,000, or disposing of plant property having a value in excess of $50,000. These restrictions in the Baltimore Contract were necessary (since Penn Water made sales to others for Consolidated's credit and account) to protect Consolidated's open-end obligations under the Baltimore Contract to purchase all of Penn Water's energy *not sold to others,* and to pay Penn Water all of its operating expenses, including the cost of purchased energy, and a net return upon all of Penn Water's investment.

Penn Water's brief (p. 8) contends that there is inconsistency between Consolidated's position that Arts. IV and V of the Baltimore Contract were inseparable from the rest of that contract, and Consolidated's position that the four provisions of the Safe Harbor Agreement described in Point I hereof were separable. There is no inconsistency whatever, for the very reason that the two Agreements and the so-called restrictions they respectively contain are completely different.

It is submitted that even Arts. IV and V of the Baltimore Contract did not effect market price fixing, monopoly, boycott or exclusion of competitors from the market (the only restraints which this Court has held illegal *per se*), and that it was, therefore, erroneous for the Fourth Circuit to have held the Baltimore Contract illegal on its face as *per se* violative of the antitrust laws, even upon the assumption that the Fourth Circuit had jurisdiction over the validity of the Baltimore Contract. Under applicable decisions of this Court, provisions such as these, before being condemned, should have been tested, after trial of the dis-

puted material facts, in the light of the factual criteria of the Rule of Reason, including (a) the lack of competition between Penn Water and Consolidated, either actual or potential, and (b) the fact that the Baltimore Contract was subject to complete governmental regulation as an interstate tariff of a licensee and public utility on file with the Federal Power Commission. The decision of the Fourth Circuit holding the Baltimore Contract illegal *per se* on its face and refusing to test it under the Rule of Reason was manifestly unsound and erroneous, even upon the assumption that the Fourth Circuit had jurisdiction of the question. This Court's denial of certiorari to review that decision of the Fourth Circuit "imports no expression of opinion upon the merits of the case, as the bar has been told many times" and "lends no support" to the Fourth Circuit's decision purporting to hold the Baltimore Contract invalid. See *U. S. v. Carver,* 260 U. S. 482, 490 (1923); *Agoston v. Pennsylvania,* 340 U. S. 844 (1950).

But be that as it may, the Fourth Circuit was *a fortiori* in error, even upon the assumption that it had jurisdiction, in *summarily* striking down the Safe Harbor Agreement on its face as *per se* in violation of the Sherman Act. This is so, because (1) Safe Harbor was not in actual or potential competition with Penn Water or Consolidated (R. 48, 124-5, 129-146, 149-152), and could not have been held to be in such competition in summary judgment proceedings, and (2) the Safe Harbor Agreement did not contain Arts. IV and V of the Baltimore Contract or any provisions like them. The only so-called "restrictions" in the Safe Harbor Agreement are those four provisions described in Point I hereof. None of them effected price fixing, monopoly, boycott or the exclusion of competitors from a market. If any of them, after trial, should be held to constitute unreasonable restraints, they were separable from the remainder of the Agreement and could not justify the invalidation of the entire Agreement.

III.

Penn Water's brief (p. 2) states that "The only issue in the Safe Harbor contract case which was not before this Court when it denied certiorari in the Baltimore contract case is whether the Safe Harbor contract is substantially identical with the Baltimore contract".

The *answer* is that, even if the Safe Harbor Agreement and the Baltimore Contract were identical, we have in the instant case (but not in the Baltimore Contract case) an admitted head-on conflict between the decision of the Fourth Circuit assuming jurisdiction over the validity of the Safe Harbor Agreement and summarily holding it invalid, and the decision of the District of Columbia Circuit holding that the FPC has primary jurisdiction over the validity of the Safe Harbor Agreement, and affirming the application of the Safe Harbor tariff as valid. If one of these decisions is right, the other is wrong. When this Court denied certiorari to review the Fourth Circuit's decision in the Baltimore Contract case, the District of Columbia Circuit *had not rendered such conflicting decision.* The instant case tenders two issues which this Court should decide, namely, (1) whether the FPC, and the District of Columbia Circuit exercising direct statutory review, or the Fourth Circuit in collateral attack procedings, had jurisdiction to determine the validity of the Safe Harbor Agreement, the provisions of which, as modified, were prescribed in their entirety by FPC as Safe Harbor's tariff of rates and services, and (2) whether the Safe Harbor Agreement, by reason of the provisions thereof described in Point I hereof, *supra*, could be held invalid *per se* on its face.

Of course, an initial issue is what does the Safe Harbor Agreement provide and what is its effect. In any case in which the validity of a contract is drawn in question, the first step must be to read and interpret that very contract, and decide what it does. Penn Water would have this Court *assume* conclusively that the Fourth Circuit was right in

its interpretation and then pass on from there. Whether the Fourth Circuit was correct in its view as to the merits of the Safe Harbor Agreement depends (1) upon the terms of the contract, and (2) upon the nature of the parties thereto and the relevant surrounding circumstances. The Fourth Circuit erred in its interpretation and it excluded from consideration the surrounding circumstances because it proceeded by way of *summary* judgment.

IV.

Penn Water's brief (pp. 8, 9) states that "There is no merit in the contention that the writ should be granted because the decision below *allegedly* conflicts with decisions of the District of Columbia Circuit" and that "The issues are different in the two cases [the instant case and the decision of the District of Columbia Circuit] and necessarily so".

The *answer* to this can be quoted directly from Penn Water's Petition for Certiorari to review the District of Columbia Circuit's decision. In that Petition (p. 1) Penn Water stated:

> "Such judgment and orders of the D. C. Circuit were entered on the decisions of a divided Court and were in direct conflict with unanimous decision of the United States Court of Appeals for the Fourth Circuit as to which this Court denied certiorari, and the related decision of the United States District Court for Maryland declaring illegal the same two power contracts and holding that the FPC had no authority to validate them by the orders here involved."

Having sought and obtained from this Court the writ of certiorari to review the decision of the District of Columbia Circuit on the ground that it conflicts directly with the decision in the instant case, Penn Water now stultifies itself by denying the existence of such conflict.

V.

Penn Water's brief (p. 6) states that the issues: (1) as to whether the FPC, or the Fourth Circuit in collateral attack proceedings, has primary jurisdiction over the Safe Harbor Agreement and (2) as to the effect which the Fourth Circuit's purported invalidation of the Safe Harbor Agreement may have upon the order of the FPC modifying and approving the Safe Harbor Agreement and ordering that it be observed as Safe Harbor's tariff, "cannot be determined in the present case in which no FPC orders are on review" and "can only be determined" in cases Nos. 428 and 429 on review by this Court of the decision of the District of Columbia Circuit.

The *answer* is that the Fourth Circuit, in the instant case, notwithstanding the objection to its jurisdiction based upon the Federal Power Act and the orders of the FPC prescribing the terms of the Safe Harbor Agreement as a filed tariff, assumed the jurisdiction and purported to strike down this filed tariff as invalid. While the order of the FPC is not on review in the instant case, a collateral judgment purporting to strike down and undo the order of the FPC is directly on review.

Thus, the instant case directly presents the issues: (1) whether the FPC or the Fourth Circuit had jurisdiction, and (2) whether the Safe Harbor Agreement, having been prescribed as a public utility tariff, is invalid on its face as *per se* violative of the Sherman Act. These issues can be and should be determined by this Court in the instant case.

VI.

Penn Water's brief (p. 7) states that the Fourth Circuit's decision in the instant case summarily striking down the Safe Harbor Agreement as *per se* in violation of the Sherman Act represents an "entirely orthodox application of the antitrust law decisions of this Court to the Safe Harbor contract".

The *answer* is that, assuming *arguendo* the jurisdiction of the Fourth Circuit, its action in purporting to invalidate the Safe Harbor Agreement was completely unorthodox. So novel was that decision that the Fourth Circuit, in its opinion, cited not a single decision of this Court supporting its action. Its decision, if permitted to stand, creates a wholly new departure in the field of antitrust law. Penn Water contends that the Fourth Circuit's decision is supported by the decisions of this Court holding market price fixing illegal *per se*. These decisions relied on by Penn Water are: *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940); *U. S.* v. *Real Estate Boards*, 339 U. S. 485 (1950); *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944); *U. S.* v. *Masonite Corp.*, 316 U. S. 265 (1942) and *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). Penn Water also relies upon the wholly inapplicable *International Salt Co.* v. *U. S.*, 332 U. S. 392 (1947) holding the exclusion of a competitor from a substantial market to be illegal *per se*.

By no stretch of the imagination can the Safe Harbor Agreement be forced into the category of market price fixing or the exclusion of competitors from a substantial market.

With regard to the validity of the Safe Harbor Agreement under the Sherman Act, the question is simply this:

Is it illegal *per se* under the the Sherman Act (not to be justified under any circumstances), for an electric utility, in its prescribed tariff of interstate rates and services, to agree to sell its entire output to its two parent companies, which created it, simply because the contract of sale also provides: (1) that the utility will make any reasonable expansion of its plant facilities that its two customers together request it to make, (2) that the utility will refrain from making such separate side agreements with either of its two customers as will defeat efficiency and economy in the coordination of the facilities and operations of the parties under the contract, and (3) that the two customers shall have the benefit of "investigation, consultation and advice" of a

joint committee appointed by them on "operating, engineering and accounting matters" pertaining to the operation of the contract?

The Sherman Act cases pertinent to the Safe Harbor Agreement are those which require application of the Rule of Reason and the factual criteria thereof set forth in *Board of Trade of Chicago v. U. S.*, 246 U. S. 231, 238 (1918). In that case we have been told just what factual considerations must be taken into account and given weight. They are: (1) the nature of the business restrained and the facts peculiar to that business; (2) the nature of the restraint itself; (3) the purpose of the restraint and the reasons for adopting it; (4) the effect of the restraint, actual or probable; (5) the history of the restraint; and (6) a comparison of the conditions of the business and market restrained before and after the restraint was imposed.

Certainly, in view of the nature of Safe Harbor, Safe Harbor's relationship to Penn Water and Consolidated, the absence of competition, actual or potential, Safe Harbor's relationship to the FPC, the nature, terms and effect of the Safe Harbor Agreement, the way in which it has operated for over twenty years, and, most importantly, the accommodation which must be made between the Federal Power Act and the Sherman Act, there is no room for summarily adjudging the Safe Harbor Agreement in isolation. Every feature of this case demands that standards of reasonableness be applied to it.

Respectfully submitted,

HARRY N. BAETJER,
ALFRED P. RAMSEY,
G. KENNETH REIBLICH,
JOHN HENRY LEWIN,
NORWOOD B. ORRICK,
Attorneys for Petitioner.

March 26, 1952.